

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

April 12, 2007

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In the Matter of  
David Gemme

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Docket No. 2007-003  
File No. 128-1044  
Charlton

**RECOMMENDED FINAL DECISION**

Kenneth E. Perron and Barbara J. Perron requested an adjudicatory concerning the Department's Affirmation of an Amended Order of Conditions issued under the Wetlands Protection Act for a project located at 25 Robert Boulevard, in Charlton. The Amendment modifies an SOC issued in September of 2004 by allowing repairs to an existing shoreline retaining wall, construction of a rock jetty to minimize beach sand migration, and installation of a fence along the property line. Amended SOC Cover Letter. The petitioners asserted in their Claim that they own property abutting the project.

The Department moved to dismiss the Claim for Failure to State a Claim Upon Which Relief Can be Granted, arguing that the relief requested is essentially for further enforcement action to be taken, which cannot be granted through an appeal like this. The petitioner did not respond to the Motion.

A Claim may be dismissed for failure to state a claim upon which relief can be granted when, after presuming all facts alleged in the notice of claim to be true, the claim does not present any grounds for relief. 310 CMR 1.01(11)(d)2. Such a motion tests the legal sufficiency

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of the claim, or whether the relief sought can be provided. In the Matter of Lawson, Docket No. 2000-111, Recommended Final Decision (February 2, 2001). Claims may be dismissed as legally insufficient if it appears beyond all doubt that the petitioner is entitled to no relief available. Matter of Sheridan, Trustee, Brookmeadow Development Trust, Docket No. 98-001, Ruling on Motion to Dismiss (June 2, 1998).

The Petitioner's claim states that the Amended Order of Conditions "does not adequately address the damage that has been done and constitutes ratification of prior violations and fails to properly address prior violations or remedy Lake fill and damage." Claim p.2. Among the alleged violations the petitioner asserts continuing work that is not authorized by the prior Orders or this Amendment, as well as work previously done which violated the terms of prior Orders.<sup>1</sup>

Identification of appropriate remedial measures is a component of the enforcement decision making authority of the agency, and a decision of whether to take enforcement and what form that action might take, is discretionary. The agency is granted a broad range of discretion in fashioning and implementing appropriate enforcement remedies. Boston Preservation Alliance v. Secretary of Environmental Affairs, 396 Mass. 489, 487 N.E.2d 197 (1986). The selection of case specific remedial measures has been left to the particular expertise of the agency by the legislature, and is entitled to considerable deference. Matter of Robert Algierie Jr., Docket No. 2003-082, Recommended Final Decision (March 10, 2004), Adopted by Final Decision (April 8, 2004) ["enforcement decisions under the Act, including the decision whether

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<sup>1</sup> Specifically, the Petitioner lists the following objections: lack of supervision of beach nourishment work done in the winter of 2004-5 resulting in significant siltation to the lake, construction of the walls in violation of the Order, extension of the Gemme property into the lake (presumably with unapproved fill), planting trees taller than 10 feet and installing a fence along the property boundary between the Gemme and Perron properties in violation of the Order, decreasing water depth in the lake from siltation, omitting the front deck from the Order's plans, excavating in the lake during construction of the wall, failing to maintain erosion controls and stabilize disturbed surfaces, and failing to stockpile debris outside of wetlands areas.

to take any action at all, are left to the discretion of the Commission or DEP”]; Matter of Town of Westwood (Westwood Public Schools), Docket No. 2001-186, Motion Decision, (June 11, 2002) [“the Department’s decision not to issue an enforcement order or assess a penalty is a matter within the Department’s enforcement discretion and may not be reviewed [through an administrative appeal”]; Matter of Augustine Luongo, Trustee, Luongo Realty Trust, Docket No. 98-053 Final Decision (March 4, 1999) Reconsideration Denied (April 16, 1999); [“It must be left to the judgment of the agency how and when to enforce the Wetlands Protection Act”]; Matter of Edward McLaughlin, Trustee ETM Realty Trust, Docket No. 97-043, Final Decision (September 24, 1997).

The petitioner’s assertion that the Amended Order does not adequately address prior violations, or correct current or ongoing violations, challenges the exercise of this discretion – in permitting the changes described in the Amendment, and not including other remedial work.<sup>2</sup> The plaintiff in Thomas M. Diccico v. Dept. of Environmental Protection, 64 Mass. App. Ct. 423, 427-8 (2005) expressed dissatisfaction similar to the petitioners in here with the agency’s response to wetlands violations. In Diccico, a residents group challenged a Consent Order requiring wetlands replication and sought a different result: restoration of the illegally filled wetlands. The Court of Appeals affirmed the Superior Court’s dismissal, finding that the discretion granted to the MassDEP making enforcement decisions under the wetlands protection act is broad, and the remedy agreed upon with the violator was within the discretion of DEP to approve. The court wrote:

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<sup>2</sup> The petitioner’s claim does not positively specify what additional action or remedy they seek, or whether such relief is related to the changes allowed in the Amendment.

General Laws c. 131, §40 thirty first par., provides neither a mandatory nor a definite standard for enforcement actions – only that a violator “may be required to restore the property to its original condition” (emphasis added). In any event the scope and nature of restoration and replication are considerations within the discretion of the DEP. Although the protected interests are stated with some specificity... the statute is silent with respect to what may or may not constitute “protection”. Citizens for Responsible Env’tl Management v. Attleboro Mall Inc., 400 Mass. at 669. We note also that the Department has expertise not only with respect to what conditions will protect the statutory interests in a given case but also with respect to what adjudicatory techniques will be administratively feasible in service of those interests. Id at 671.

Id. at 428.

As no enforcement can be compelled from the agency through an adjudicatory appeal, I recommend granting the Department’s Motion to Dismiss under 310 CMR 1.01(5)(a)(15.f.v. for failure to state a claim upon which relief can be granted, and making the Amended SOC final.

### **NOTICE**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner’s Final Decision is subject to the rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner’s office regarding this decision unless the Commissioner, in her sole discretion directs otherwise.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

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Ann Lowery  
Presiding Officer

*Adopted by Acting Commissioner Arleen O'Donnell, April 19, 2007*